SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 775

GREAT SOUTHERN TRUCKING COMPANY, A CORPORATION, AND L. A. RAULERSON,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to Official Report of Opinion Rendered in Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, which the petitioners now ask this Court to review, has not yet been printed in the official reports, but is set forth fully herein in the transcript of record (R. 58).

Statement of Grounds on Which the Jurisdiction of This Court Is Invoked.

Jurisdiction to review and determine this cause is conferred upon this Court by the provisions of Section 347 of Title 28, U. S. C. A.

The petitioners pray the Court to assume such jurisdiction and grant writ of certiorari herein on the grounds that a proper and just determination of the issue now presented is important in the administration of the National Labor Relations Act (Section 151, et seq., Title 29, U. S. C. A.) and will greatly aid, to the general public benefit, in the disposition of controversies arising under that Act.

Statement of the Case.

There has been no hearing or taking of evidence in this proceeding, and the only facts before the Court are those set forth in the pleadings, that is, in the National Labor Relations Board's petition to adjudge the Great Southern Trucking Company and its President in contempt (R. 21), the answer of the Company and its President (R. 31), and the reply of the Board to certain portions of the answer (R. 56). Substantially all of the facts to be derived from these pleadings are set forth hereinabove in the petition to this Court for writ of certiorari.

Specification of Error.

The petitioners assign as error the refusal of the court below to modify its original decree in view of the new facts and circumstances shown to that court in the answer there filed in this contempt proceeding, which facts and circumstances are substantially set forth hereinabove in the petition to this court for writ of certiorari; and the petitioners assign as error that the court below, instead of thus modifying its original decree, adjudged the petitioners to be in contempt.

ARGUMENT.

I.

The Issue Which the Case Presents.

The situation here is this: None of the employees affected by this proceeding belong to the Union which is here involved. On the other hand, they affirmatively protest against being represented by that Union and against their employer bargaining with that Union for the purpose of making a contract to govern their jobs and the terms of their employment (R. 39A). Approximately five years ago, this Union did represent employees who then held these jobs. At that time, so the National Labor Relations Board has found, the employer failed to bargain with the Union.

The question in the case is whether that failure of the employer to bargain with the Union according to the wishes of former employees some five years ago is sufficient reason for compelling the employer to bargain with that Union today, contrary to the wishes of its present employees. Essentially, the question is whether the wrong done by this Company to those who were once its employees is to be corrected by requiring the Company to perpetrate a corresponding and equivalent wrong upon those who are now its employees. When the case is sifted from beginning to end, it will be found that the issue is this and nothing other than this.

This issue should be answered in favor of the order entered by the court below if it be the essential object of the National Labor Relations Act to force an employer in any event to do whatever he once should have done—no matter what other interests are thereby overridden. If, however, as is generally recognized, the dominant purpose of the National Labor Relations Act is to protect and implement the desires of employees with respect to collective

representation, then the order of the court below should be reversed, for it directs this Company to disregard and to violate the specifically expressed wishes of its employees on this very subject of collective representation.

> "* * * For the overriding consideration must always be the employees' untrammelled freedom of choice; upon that the whole frame-work rests."
>
> L. Hand, J., in *National Labor Relations Board* v. *Dadourian Export Company*, 2 Cir., 138 F. (2d) 891, 893.

II.

This Company's employees having declared themselves against the Union, their expressed desires, instead of being disregarded and overridden, should control the case.

Who are this Company's employees who have expressed their choice against the Union in question? Are they employees fully and in every sense of the word and entitled to whatever rights are possessed by employees generally? They are indeed, nor does the opposition contend otherwise.

Through the Company's compliance with the Board's original order relative to reinstatement of the former employees (R. 32-34), these present employees became established as the Company's employees in fact and in law. No other persons can oust them from their jobs. No other persons can demand employment of the Company. These individuals are, therefore, employees possessing whatever rights any employees possess, including the rights guaranteed by the National Labor Relations Act.

What do they say with respect to their collective representation—the fundamental matter with respect to which rights are guaranteed to them by the National Labor Relations Act?

They say (R. 39A) that they have observed from the notice posted by the Company that the Union here in question will represent them in bargaining with the Company for a contract affecting them. They say that none of them "belong to" this Union; that they do not want this Union "to represent" them "in any way", and that they desire a hearing or an election "to show" this to be their "own free will" in the matter. These clear expressions of choice by these employees, instead of being treated as the "overriding consideration" controlling the case, have been flatly rejected and disregarded by the Board and by the court below. For what reason are they thus rejected and disregarded?

Here is the crux of the case. Since the choice of the employees is the "overriding consideration" upon which rests "the whole frame work" of the administration of the National Labor Relations Act, and since the decision of the court below admittedly ignores the choice expressed by the employees here, and orders the Company to do likewise, therefore, the decision should be reversed—unless there be valid reason why the declared wishes of these employees should be rejected. What possible reason is there for ignoring the expressed will of the employees in the matter?

The answer, says the court, is that the choice which these employees have made is not their free choice (R. 62-63). How does the court know this? With all due respect, the court does not know this. The court simply declares it to be so. The court summarily announces that the employees' signed declaration is not "a true expression of their unhampered will" (R. 62). The employees clearly think otherwise. They think they are speaking their "own free will". They specifically say they are. The court in effect benignly replies to them, "You do not know your own minds; you are not speaking your 'own free will', even though you say you are and think you are. You are under a wrongful influence

from your employer and don't realize it. Therefore, we will proceed exactly contrary to your requests and will require you to be represented by an agency to which you object."

But, say the employees, we ask for a hearing or an election "to show" that we are speaking "our own free will". This, too, the court rejects; though it is difficult to see why.

> "This position * * * is predicated upon the viewpoint that labor, as a group, is docile and uninformed. We can not accept this fundamental position. We are of the opinion that the labor group is now quite aware of its statutory rights, and is instilled with an aggressive spirit that, before the passage of the Act, may long have been kept dormant. The still picture of a sheep-like body of laboring men, placidly led by a dominating employer, is not representative of the true situation."
>
> *E. I. DuPont de Nemours & Company* v. *National Labor Relations Board*, 4 Cir., 116 F. (2d) 388, 398.

Surely the assertion of the employees here that their minds are free is enough at least to justify an inquiry. Surely the state of mind of these employees is not and ought not to be a matter of legal and irrebuttable presumption, utterly beyond question. If it be thought that they are subject to a wrongful influence, despite their assertions to the contrary, then why should effort not be made to ascertain the truth as to this? Let them express themselves by secret ballot. Or if thought needful, let them and any other material witnesses be examined and cross-examined.

Is there no possibility that these employees speak the truth when they say that they choose against the Union of their own free will? Is it not possible, as suggested in the dissenting opinion below, that apart from wrongful influ-

ence, they "sincerely and spontaneously prefer to have no union at all"? Is this so inconceivable that it should not even be inquired into?

If it be objected that it would be difficult to ascertain what influences led these employees to make a choice against the Union, the answer is that a case is not to be disposed of upon judicial presumption simply because the facts may be difficult of ascertainment. Questions as to influence, motive, intent and state of mind are frequent and basic subjects of inquiry before courts and administrative tribunals. The National Labor Relations Board neither hesitates nor finds any great difficulty in deciding numerous cases upon what it finds to be the influences and motives operating in an employer's mind. If then it is thought that wrongful influences are operating on the minds of these employees, why is there a flat refusal either to make inquiry of them or to investigate the pertinent and surrounding circumstances?

> "Having in mind that *it is the fundamental policy of the Act to permit employees freely to choose their representatives,* it follows that the employees have a right to change their choice, and when that fact has been brought sharply to the attention of the Board, as in this case it was, we think, the duty of the Board to investigate the claim." (Emphasis supplied.)
>
> *Hamilton-Brown Shoe Company* v. *National Labor Relations Board,* 8 Cir., 104 F. (2d) 49, 55.

A. *It Can Not Be Validly Claimed That the Employees Here Were Influenced to Declare Themselves Against the Union by Any Violation on the Part of the Company of the Original Decree of the Court Below.*

What could be the wrongful influence from this employer which caused the court below to ignore and affirmatively override the expressed choice of these employees? What

does the court say constitutes such wrongful influence? As to this, the majority opinion is quite definite (R. 61):

> "The failure of the Company to take the curative action dictated by us necessarily must have had a telling impact on the new employees. Indeed, had the Company acted lawfully and obeyed the command of our decree by recognizing and bargaining with the Union, the Union probably would have recruited in its ranks a proportionate share of adherents from the new employees."

And again (R. 62):

> "If the employees do now affirmatively oppose the Company's bargaining with the Union for a contract affecting them, it is only because the Company, in violation of our decree, has continued its policy of unlawful antagonism to the Union."

This, then, is the court's answer to the crucial question, "Why should the choice of these employees with respect to their collective representation be ignored?" And the answer which the court has given the petitioners believe they can show to be a complete fallacy.

The court's decree requiring the Company to bargain with the Union only directed the Company to do so "upon request" from the Union (R. 3). And it is indeed unquestioned that employers generally are under obligation to bargain with representatives of their employees only when affirmatively requested by such representatives to engage in such bargaining. *National Labor Relations Board* v. *Columbian Enameling & Stamping Company*, 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660.

When the original decree of the court below became final on October 12, 1942, the Company immediately set about to comply with all the terms of that decree. One step the Company took under that decree was to post notices declaring its intention and readiness to obey the decree in

every respect, including that provision of it which commanded the Company, upon request, to bargain with the Union here in question as representative of the Company's employees. The Company did fulfill all the terms of the decree except that pertaining to collective bargaining, and only awaited the request of the Union to commence such bargaining.

It was not, however, until shortly prior to February 9, 1943 that the Union requested the Company to engage in bargaining. By that time, the employees had already made their declaration against the Union. Thus it was only after the employees' declaration against the Union that the Company, on February 9, 1943, failed and refused to bargain with the Union. That is, February 9, 1943 was the first occasion on which the Company failed and refused to bargain with the Union after the court's decree became final, and this also was the first occasion on which the Company failed in any respect to carry out each and every provision of the decree. However, as pointed out above, on this date, the employees had already made their clear choice against the Union. Then certainly, they could not have been influenced to do so by the Company's failure to carry out the court's decree—the first failure of the Company to obey the court's decree not occurring until later. When the employees made their declaration against the Union, the Company was in strict compliance with the decree of the court; had already fulfilled every provision of the decree, except that requiring it to bargain with this Union; and had definitely announced that it stood ready to fulfill that provision.

How, then, can the court say that

> "the failure of the Company to take the curative action dictated by us necessarily must have had a telling impact on the new employees",

when at the time the employees took their stand against the Union, the Company had taken every curative action dictated by the court, omitting none?

How can the court reason that if the Company had

> "* * * obeyed the command of our decree by recognizing and bargaining with the Union, the Union probably would have recruited in its ranks a proportionate share of adherents from the new employees",

when on the other hand, the Company was in strict obedience to all the commands of the court's decree at the time the employees announced that they did not propose to become adherents to the Union?

Most clearly, the court says:

> "If the employees do now affirmatively oppose the Company's bargaining with the Union for a contract affecting them, it is only because the Company, in violation of our decree, has continued its policy of unlawful antagonism to the Union."

The court's decision rests upon that proposition. But the proposition is completely unsound. It can not be that the employees "affirmatively oppose the Company's bargaining with the Union for a contract affecting them only because the Company" is "in violation" of the court's decree—for the employees took their position of opposing the Union's bargaining for them at a time when the Company was not in violation, but on the other hand, was in compliance with the court's decree. It simply can not be said that the employees made their choice against the Union "only because", or even to any extent because, the Company was "in violation" of the court's decree—the plain truth and fact being that up to the time the employees made their choice, the Company had not violated the court's decree in any respect but had obeyed it in every respect.

B. *It Can Not Be Validly Claimed That the Employees Here Were Influenced to Declare Themselves Against the Union by Any Unfair Labor Practice on the Part of the Company Prior to the Issuance of the Original Decree of the Court Below.*

If the untenable position taken by the court below be altered and instead of declaring that a non-existent violation of the court's decree was the cause of the employees' declaration against the Union, it be contended rather that unfair labor practice on the part of the Company prior to the time it began to comply with the court's decree influenced or may have influenced these employees to declare themselves against the Union—still nothing of any substance whatever is made out. What unfair labor practice on the part of this Company could be claimed as having possibly influenced these employees?

As pointed out above, any act or event occurring after the making of the choice in question, is obviously to be excluded as a possible influence upon the making of that choice. Therefore, whether considered in its character as an unfair labor practice or as a violation of the court's decree, the failure of the Company to bargain with the Union on and since February 9, 1943 can not in any event be relied upon as any factor whatever in causing the prior declaration against the Union.

As to the period from the time of the Board's hearing in December, 1939 down to February 9, 1943, there was and is no charge or contention of any wrong-doing or unfair labor practice whatever on the part of this Company.

If, therefore, it is to be claimed that wrongful acts on the part of the Company caused or influenced the employees' declaration against the Union in January, 1943, there are absolutely none to rely on save those charged at the time of the Board's hearing in December, 1939. Of these, each

and every one except that pertaining to collective bargaining had been fully and completely corrected before the employees made their declaration against the Union. Granting that the wrongful influence of such unfair labor practices may have continued long after they were committed and after the time of the Board's hearing in 1939, still, when the Company, after losing on appeal, took with respect to such unfair labor practices all the corrective action ordered by the Board, then they could no longer or thereafter be claimed as wrongful influences against the Company's employees. As to such unfair labor practices, the Company's slate has been made clean. As to them, the Company had done all it had been ordered to do and all it could ever do. These unfair labor practices, with their trail of wrongful influence, had therefore been expunged and wiped away. This must be true, else legal consequences would never cease to flow from a wrongful act, even though all that a court had decreed in judgment thereon had been fully performed.

Thus, we come down to the proposition that if unfair labor practice on the part of this Company is to be claimed as having influenced or "probably" influenced its employees to declare against the Union in January, 1943, then the only unfair labor practice which can be so relied on is the failure of the Company to bargain with the Union in 1939. When this contention is analyzed, however, it, too, is found to be shadow instead of substance. The argument to this effect is that these employees, having seen this Company in 1939 fail to bargain with the Union and thus realizing that the Company had no intention to deal properly with the Union, were presumably thereby influenced against the Union.

The answer to this, in the first place, is that there was no actual refusal to bargain with the Union when it represented the Company's employees in 1939. Nor was there any failure to bargain in good faith which would have been

readily apparent to an observer—even to a close observer. On the contrary, the Company thought it was bargaining in good faith with the Union. The Board's Trial Examiner thought so, too, and made findings accordingly. He, it should be remembered, is the only person sitting in judgment upon this case who has ever seen and heard the witnesses. Cf. *A. E. Staley Manufacturing Company* v. *National Labor Relations Board*, 7 Cir., 117 F. (2d) 868, 878.

Furthermore, as a matter of practical fact, virtually all of the employees now in question were strangers to this Company when the Company failed to bargain with the Union in 1939, and therefore, had no occasion or opportunity to observe any unwillingness on the part of the Company to bargain with the Union as representative of the persons then in the Company's employ.

Finally, it must certainly be recognized that when the present employees made their declaration against the Union in January, 1943, they could not have been influenced to do so by any impression that the Company's attitude was one of opposition to bargaining with the Union or one of intention not to bargain with the Union. For at the time these employees made their declaration, the Company had definitely announced that it was going to bargain with the Union as soon as requested to do so. They had every reason to believe, rather than to doubt, this statement on the part of the Company. They had seen the Company, in accordance with such statement, fully carry out all the other terms of the court's decree. That they did believe the Company was going to bargain as set forth in the posted statement or notice is clearly established by the fact that their declaration, according to its own terms, was prompted by the notice. It follows that they were making their declaration against the Union because they believed the Company was going to bargain with the Union as stated in the notice. Since they did believe this, how can it be argued that they

were under a contrary impression—that is, an impression that the intention of the Company was not to bargain with the Union? They acted not because they thought the attitude of the Company was to avoid bargaining with the Union, but just the reverse—because they were convinced that the Company intended to bargain and was about to bargain with the Union.

Thus it can not be reasonably argued, much less conclusively presumed, that the motivating influence causing these employees to declare themselves against the Union was an impression that the Company would evade bargaining with the Union. If they had ever been under such impression and belief, they certainly no longer were. It was an exactly opposite impression and belief which influenced, prompted and caused them to make their declaration.

Upon all the foregoing, it thus becomes clear that it can not be claimed that the employees' expression of choice here in issue was caused or influenced by any violation of the court's decree nor by any unfair labor practice on the part of the Company other than its original failure to bargain, nor indeed by that original failure to bargain. These are the only reasons which have been or possibly could be advanced as grounds for rejecting and overriding the employees' declared choice. Since these reasons can not stand, why should not the employees' declaration be accepted as an expression of their free choice and, therefore, controlling upon the question of this case—that is, the question as to whether the Union shall represent them in bargaining with the Company for a contract affecting them? At any rate, in view of all the foregoing, can there be any justification for refusing an inquiry as to what is the free choice of these employees on this question?

III.

The bargaining commanded by the court below in the name of "free will" for the employees would impose upon them an exactly opposite status.

When the court below closes the whole matter simply by declaring that the employees' signed statement does not represent their free choice, what is the court doing to give them a free choice? The court says that by ignoring their present requests and forcing them to be represented in bargaining which is vital to them by a Union which they oppose, they will be restored to a capacity they now lack—a capacity to choose freely. Thus by compulsion, they will be made free!

It must be noted that this action is not and can not be ordered in any sense or to any degree for the benefit of the Union. The law does not recognize the Union as having for itself and apart from these employees any interests or rights whatever in this entire matter.

> "The theory of the Board seemingly is that the contest is not one wherein the employees are interested. It is a contest between the employer and the C. I. O. and the employees are merely the causi belli."
>
> *National Labor Relations Board* v. *Automotive Maintenance Machinery Company*, 7 Cir., 116 F. (2d) 350, 355.

Nor does the action prescribed by the court have as its purpose the punishment of the Company for wrong doing. Nor is it for the benefit of the former employees.

Rather, says the court, it is a purely "remedial measure" in the interest of the present employees who are conclusively presumed to be under a wrongful influence from the Company. The basic objective in this proceeding, as in all proceedings arising under the National Labor Relations Act, the court concedes, is to insure a condition of free choice on the part of employees with respect to collective representa-

tion and action. Here, says the court, these employees are in a condition such that they can not make a free choice. A remedial measure must be carried through for *their* benefit. What is the remedy prescribed? It is that these employees must for a season be forced against their protests to be represented in collective bargaining by a Union which they have never joined and which they object to. This overriding of their wishes is to give them a greater freedom of mind in Union matters; thereby they will gain the "free will" they now lack! To them this undoubtedly will seem a strange variety of freedom.

IV.

In the situation here existing, it would be impossible for the bargaining which the court has ordered to produce any practical or substantial result.

It is well to consider the practical dilemma which would arise upon the Company and the Union actually engaging in collective bargaining as ordered by the court below. Such bargaining would, of course, have no other purpose than to arrive at a contract affecting the employees and governing the terms and conditions of their employment. The effort to agree upon such a contract would imply throughout, and invariably it is expressly so stated in such contract, that the Company recognizes the Union as representative of the employees affected by the contract. In the present situation, this would be the opposite of the truth. The entire proceeding and any contract reached would rest upon a false premise.

Such contracts usually contain provisions for Union security in some form and to some degree; for example, by stipulating a closed shop, a union shop, maintenance of union membership or a check-off of union dues. Here, however, the Union in truth and fact has no status to secure. To bargain for the maintenance of its member-

ship when in truth it has no membership, or for the check-off of its dues when it has no dues, would be an ironical procedure.

Contracts between employers and unions representing their employees almost invariably contain provisions respecting the wages, hours, seniority privileges and other working conditions of such employees. Here, however, how can the Union know what the employees want with respect to these matters or what they ought to have, since there is no communication or connection between the Union and these employees? How could the Company be expected to make any agreement on any of these matters without knowing what the employees desire and what they oppose? Nor would the Company be at liberty to consult or confer with these employees while engaged in bargaining with the Union. Likewise, if they made known any position on their part contrary to any request being made by the Union, the Company would be under obligation to disregard their representations.

Indeed, it is as a practical matter impossible to see how genuine and bona fide efforts to reach a contract of any substance whatever are to be carried on between this Company and this Union in the situation here existing. The collective bargaining which the court has ordered would be so artificial and unreal as to border on the farcical.

V.

If the situation here were reversed, it seems unlikely that the ruling then would be consistent with the ruling which has been made herein.

It is pertinent to consider what the Board and the court below would order if the situation here were the reverse of what it is. Suppose that in 1939 the Company had wrongfully bargained with a Union not representing the free choice of a majority of its employees and against

the protest of a majority of those then in its employ; and then in 1943, the former employees being no longer with the Company, the new employees say that of their own free will, they desire to be represented by this Union and ask the Company to bargain with the Union as their representative. Is there any doubt but that the Company would be directed to proceed to bargain with the Union? Would there be any ruling that the new employees are presumed to be under the influence of the Company's wrongful recognition of the Union in the past, and that they, therefore, would not now have the capacity to make a free choice in favor of the Union?

It is respectfully submitted that such would not be the ruling. But if such would not be the ruling in that situation, then it should not be the ruling in the present situation. Failure to deal with a bargaining representative in violation of employees' wishes is no worse and should entail no greater or different legal consequences than to deal with an agency not the representative of employees in violation of their wishes. The choice of subsequent employees is no more vitiated in the one case than in the other. And if in the supposed situation the choice of the new employees in favor of the Union would not be conclusively ignored and set aside, then just as truly in the present situation, their choice against the Union should not be so ignored and set aside.

VI.

The petitioners concede that their present position is supported only by the rights and interests of their employees, but those rights and interests should be controlling in the case, and the petitioners are therefore entitled to oppose an order which would force them to violate those rights and interests.

It will be observed that the argument of this brief rests entirely upon the interests and rights of the em-

ployees who are affected by the case. The petitioners have presented no reason why they should not be required to bargain with the Union as directed by the court below, except that the Company's employees are not represented by the Union and object to the Company's bargaining with the Union "as" their representative for a contract to govern their jobs and conditions of employment. Insofar as the merits of the petitioners themselves are concerned, if nothing more appeared, there is and has been since the original decree became final, no reason why they should not proceed to bargain with the Union as ordered—as indeed they definitely announced they were ready to do.

But cogent and dominating reason why the petitioners should not proceed to bargain as ordered is found in the interest of the employees affected. That interest on the part of the employees, namely, that their desires with respect to collective dealing shall not be disregarded but shall be heeded and complied with—that interest the petitioners understand to be, as hereinbefore pointed out, the "overriding consideration" upon which rests "the whole frame-work" of rights, duties and action under the National Labor Relations Act. The employees who are here affected and who have spoken their desires with respect to the situation now before the court are, of course, not parties to this proceeding, but their rights and interests are directly and immediately at issue in the question as to whether the action which the petitioners have been ordered to take is lawful and proper under the National Labor Relations Act.

It might be asked why this Company is now so solicitous of the interests of its employees, whereas, in 1939, it failed to follow their desires in regard to bargaining with their chosen representative. The answer, in the first place, is, as hereinbefore pointed out, that the Company thought in 1939, as did the Board's Trial Examiner, that it was bar-

gaining in good faith with the Union as representative of its employees.

Moreover, it would seem that the only interest of the Board and the court should be to see to it that the Company is now complying with the desires of its employees in this field, irrespective of any failure of the Company to do so in the past. Certainly the Company's violation of its employees' wishes with respect to collective bargaining in the past, as has been found against it, is a strange reason for compelling the Company to commit the same wrong again. To do so, the petitioners respectfully submit, is a perversion of the National Labor Relations Act; it is applying and administering that Act in reverse.

> "The Board's selection of a bargaining agent is quite as violative of the spirit of the Act as the employer's domination of the employees when they are making their choice."
>
> *National Labor Relations Board* v. *Automotive Maintenance Machinery Company*, 7 Cir., 116 F. (2d) 350, 356.

> "*The purpose of the statute* is to guarantee to the employees absolute freedom of choice as to their representatives, and that freedom should not be controlled or influenced either by the employer or by any expression or form of order coming from the Board." (Emphasis supplied.)
>
> *National Labor Relations Board* v. *P. Lorillard Company*, 6 Cir., 117 F. (2d) 921, 923 (modified on other points).

VII.

Court Decisions in Similar Cases.

A substantial number of decisions in favor of the contentions presented by the petitioners have been rendered in cases where the factual situations were not nearly so strong

in support of those contentions as they are in this case. Some of these decisions are quoted below.

Per contra, several decisions tending against the contentions herein presented have been rendered—but, likewise, in cases where the facts would not by any means support the contentions now being made as clearly and as precisely as do the facts in the case now before the court. The principal decisions in this group are hereinafter analyzed.

The petitioners have found no precedent for the ruling of the court below upon the factual situation here presented. On the other hand, the decisions hereinafter quoted rendered in favor of the position now taken by the petitioners and upon facts less strongly supporting that position, are certainly precedents for reversal of the order entered by the court below.

In the case of *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, the Board had ordered the Company to deal exclusively with a certain Union as representative of the Company's employees. This court, in modifying the order, directed the Board to take into consideration changes in circumstances which affected the Union's representation of the employees. The court said:

> "The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. *But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election.*" (Emphasis supplied.)
>
> *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, 262, 83 L. Ed. 627, 638, 59 S. Ct. 490.

In a similar case, the Circuit Court of Appeals for the Second Circuit, per L. Hand, J., says:

> "Section I(d), insofar as it merely compels the respondent to treat with the Joint Board, is within the language of section 8 (5), 29 U. S. C. A. sec. 158(5) and was plainly warranted. However, that was nearly two years ago, and it is possible that the Joint Board will no longer represent a majority of the men, even after those who struck are restored to their jobs, as later sections of the order provide. *The membership of a union is constantly changing, and it may at any time cease to represent the majority; if it does, it loses its power to bargain for the unit. When the authority of the representatives is in doubt, the Board must inquire and certify under section 9(c), 29 U. S. C. A. sec. 159 (c), that their authority exists, or its order will be without support in the evidence.* In the case at bar we could not in any event judge of the Joint Board's continued authority until the old men are reinstated, which the Labor Board has required—lawfully as we shall show later; and even after that has been done, *it will still be impossible to judge, for not only will there have been many changes in personnel, but the men may not be of the same mind.* Yet the order in form requires the respondent to recognize the Joint Board indefinitely in the future, and if that really assured them of a perpetual tenure, it would be objectionable for the reasons just given. It does not. *Practically, the issue will arise only when there is a new occasion for negotiation, and the Joint Board demands renewed recognition as bargaining agent of the unit.* Our order must not then guarantee their power, if it shall appear that they have lost it; but yet it should give them some presumptive authority, for otherwise the act will not be workable. They will be the last representatives; and the respondent must challenge their power for this reason in good faith, and it must invoke an inquiry by the Labor Board under section 9(c), 29 U. S. C. A., sec. 159(c), if it does not treat with them. *But if it does so, we shall not treat its refusal as a contempt, until after the Labor Board has certified the result.* It will not be necessary

to insert this proviso in the order; it is to be understood as incorporated into it. Section I(d) of the order is valid." (Emphasis supplied.)

National Labor Relations Board v. *Remington-Rand, Inc.*, 2 Cir., 94 F. (2d) 862, 869.

Likewise, in *Hamilton-Brown Shoe Company* v. *National Labor Relations Board,* the Circuit Court of Appeals for the Eighth Circuit ruled as follows:

"So, in the instant case, the Board, after giving effect to its order to restore the status quo by reinstating the employees wrongfully discharged, and by disestablishing the company union, and requiring the employer to cease and desist from recognizing such union as a bargaining agency, should settle the question as to representation by requiring an election. *We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it can not be assumed that the Union is now the accredited representative of the employees, but the showing made, and it stands without dispute, is at least sufficient to require investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employee to recognize the Union as the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal.* A court of equity will not do useless, unjust, or inequitable things. In re Hawkins Mortgage Co., 7 Cir., 45 F. 2d 937. Courts do not deal with abstractions. The proceedings here are substantially proceedings in equity in that equitable rules are applicable. National Labor Relations Board *vs.* Cherry Cotton Mills, 5 Cir., 98 F. 2d 444. This court is granted power to modify orders of the Board (Section 10f)." (Emphasis supplied.)

Hamilton-Brown Shoe Company v. *National Labor Relations Board*, 8 Cir., 104 F. (2d) 49, 56.

In *Stewart Die Casting Corporation* v. *National Labor Relations Board,* the Circuit Court of Appeals for the Seventh Circuit, dealing with the same sort of circumstances, says:

> "It is not to be overlooked that the controversy concerning the Union as an appropriate bargaining agency occurred in 1937, now more than three years past. As pointed out heretofore, this and other courts have held that where a majority is shown, there is a presumption of its continuance in the absence of proof to the contrary, but we are of the opinion that such presumption continues for a reasonable time only. Certainly there is no presumption that it continues forever, and we think that it does not continue for as long as three years, especially in face of an assertion and offer of proof to the contrary. We should think that the Union itself would welcome an opportunity to demonstrate that it represents a majority of the employees and we see no reason why the Board should object. We are not unmindful of the familiar argument advanced by the Board that a fair election cannot be had until the last vestige of unfair labor practice has been removed as required by the Board's order. In other words, so it is argued, the unfair acts on the part of the employer create in the employee a state of mind which prevents a free expression of opinion on his part. *To us this argument is imaginary rather than real. In fact, the opposite effect, if any, would be the natural result. We accord to the ordinary employee, intelligence such as will enable him to know when he is being imposed upon by his employer, as well as the ability to properly protect his own interest in an election conducted by secret ballot, for the purpose of determining whom he desires as his bargaining agent.*" (Emphasis supplied.)
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> *Stewart Die Casting Corporation* v. *National Labor Relations Board,* 7 Cir., 114 F. (2d) 849, 858.

To the same effect are the decisions of various Circuit Courts of Appeal in:

National Labor Relations Board v. *Hollywood-Maxwell Company*, 9 Cir., 126 F. (2d) 815;

National Labor Relations Board v. *Karp Metal Products Company*, 2 Cir., 134 F. (2d) 954;

National Labor Relations Board v. *National Licorice Company*, 2 Cir., 104 F. (2d) 655;

National Labor Relations Board v. *American Manufacturing Company*, 2 Cir., 106 F. (2d) 61;

Cupples Company v. *National Labor Relations Board*, 8 Cir., 106 F. (2d) 100.

There is, of course, no question but that a decree of court can be and should be modified if changed or newly arisen circumstances so justify. As stated by this court in *United States* v. *Swift & Company*, per Cardozo, J.:

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. * * * A continuing decree of injunction directed to events to come *is subject always to adaptation as events may shape the need.* * * * *In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.*" (Emphasis supplied.)
>
> *United States* v. *Swift & Company*, 286 U. S. 106, 114, 76 L. Ed. 999, 1005, 52 S. Ct. 460.

> "There is no doubt but that the court which renders a decree for permanent or perpetual injunction may open or modify the same where the circumstances and circumstances of the parties are shown to have so changed as to make it just and equitable to do so. * * * The Court has inherent power in this respect and may exercise it after the term in which the decree is rendered.

"As regards the causes or occasions which may call for the modification or suspension of a permanent injunction, the rule seems to be that the Court, in its discretion, may always permit or order such modification or suspension where it believes the ends of justice will be thereby served. Where the grounds and reasons for which the injunction was granted no longer exist, by reason of changed conditions, it may be necessary to alter the decree to adapt it to such changed conditions, or to set it aside altogether, as where there is a change in the controlling facts on which the injunction rests. * * * On application to modify the decree, the inquiry is simply whether changes since its rendition are of sufficient importance to warrant such modification."

28 Am. Juris., Sec. 323, pages 494 and 495.

In a contempt proceeding, *National Labor Relations Board* v. *Federal Bearings Company,* 2 Cir., 109 F. (2d) 945, the Circuit Court of Appeals for the Second Circuit specifically held that under circumstances arising after the entry of its decree, "failure to obey the decree * * * was not a contempt of court".

At first glance, decisions of this court in *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 84 L. Ed. 1226, and *National Labor Relations Board* v. *P. Lorillard Company,* 314 U. S. 512, 86 L. Ed. 380, might seem to oppose the contentions advanced by the petitioners herein. Upon examination, however, it is to be seen that such is not the case.

National Labor Relations Board v. *Bradford Dyeing Association* presented a situation in which the employees involved had left one union and joined another. This court refused to recognize or heed their change of choice because it had been expressly found that their employer had been active "in persuading, intimidating and coercing its employees to join the Federation and leave the T. W. O. C."

The petitioners freely concede that if it had here been found that they affirmatively procured or influenced the employees now in question to make their declaration against the Union, then the ruling of the court below would be entirely correct. Here, however, it is not charged or contended from any source that such has been the case.

In *National Labor Relations Board* v. *P. Lorillard Company*, this court was dealing with a situation where, as the court says, the union which had represented the employees "*might* no longer represent the majority" and where there was "a *possible* shift in membership". In the instant case, there is no such doubt or ambiguity as to the crucial facts. Here there is no question as to whether the union "might" no longer represent the employees or whether there has been a "possible" change as to its actual authority to speak for them. The employees expressly declare that they do not belong to the Union and that it does not speak for them; and moreover, they affirmatively object to their employer's bargaining with that Union for a contract affecting them. Such facts do not appear in *National Labor Relations Board* v. *P. Lorillard Company*.

In the case of *National Labor Relations Board* v. *Highland Park Manufacturing Company*, 4 Cir., 110 F. (2d) 632, 640, the Circuit Court of Appeals for the Fourth Circuit pointed to the same elements of doubt and negativeness as existed in *National Labor Relations Board* v. *P. Lorillard Company*. But the very factors which the Fourth Circuit Court referred to as lacking are specifically present in the case now under consideration. In the *Highland Park Manufacturing Company* case, the court said:

> "In such case, it is reasonable to presume that the authority of the bargaining agent continues *until the contrary be shown.*" (Emphasis supplied.)

In the present case, the contrary is affirmatively and specifically shown.

The court further said:

> "* * * There is nothing in them (affidavits) to the effect that the employees are not willing to have it (the Union) bargain for them."

Here the employees have expressly and with emphasis declared that they are unwilling to have the Union bargain for them.

In *National Labor Relations Board* v. *Franks Brothers Company*, 1 Cir., 137 F. (2d) 989, the Circuit Court of Appeals for the First Circuit affirmed an order of the National Labor Relations Board directing the employer company to bargain with the union there involved, although a majority of the former members of the union had voluntarily quit the Company's employ. The Circuit Court said that it considered its ruling to be compelled by the decision of this court in *National Labor Relations Board* v. *P. Lorillard Company, supra.* The clear differentiation between *National Labor Relations Board* v. *P. Lorillard Company* and the case now presented is pointed out above. Moreover, the situation in *National Labor Relations Board* v. *Franks Brothers Company* involved the same element of ambiguity relied on by the Fourth Circuit Court of Appeals in rendering its decision in *National Labor Relations Board* v. *Highland Park Manufacturing Company, supra;* that is, it did not appear what the affirmative desires of the new employees were with respect to their being represented by the Union. Here it appears affirmatively and definitely enough what the desires of the employees are in this regard.

In concluding this argument, the petitioners point again to what it is the employees affected by this proceeding are saying. They say that they do not belong to the Union here in question. They protest against that Union representing them in bargaining with their employees for a contract governing their jobs and the terms of their employ-

ment. They say that in thus declaring themselves, they speak and act of their own free will. There is nothing in this case upon which it can be judicially and conclusively pronounced that these expressions do not represent their free will.

It is respectfully submitted that in this state of affairs, the petitioners' bargaining with the Union for a contract to govern these employees would be, under the National Labor Relations Act, neither reasonable nor lawful.

WHITEFORD S. BLAKENEY,
Counsel for Petitioners.

GUTHRIE, PIERCE & BLAKENEY,
Of Counsel.